Re: Abdul Razak bin Jaafar; Ex-Parte: Affin Bank Berhad

HIGH COURT (KUALA LUMPUR) — KEBANKRAPAN NO D8–29–1149 OF 2004
KANG HWEE GEE J
19 MARCH 2007

Banking — Banker and Customer — Duty of customer — Rectification of address which was wrongly stated in the letter of guarantee

Bankruptcy — Notice — Substituted service — Application to set aside the order for substituted service of the bankruptcy notice

Bankruptcy — Practice and procedure — Service of bankruptcy notice — Whether judgment creditor had complied with the procedural requirements to make an application for substituted service of the bankruptcy notice — Whether judgment creditor entitled to rely on the address stated in the letter of guarantee

The judgment debtor appealed against the decision of the Senior Assistant Registrar in dismissing the judgment debtor's application to set aside the order for substituted service of the bankruptcy notice which was served by advertisement, posting at the court notice board and posting to an address of a company which the judgment debtor had provided in the letter of guarantee. The grounds for the appeal were inter alia that (1) the judgment creditor should have made two calls at the judgment debtor's residential address as required by Practice Note No.1 of 1968; (2) the purported personal service of the bankruptcy notice on the judgment debtor was made at the company's wrong address; and (3) having failed to serve the notice by personal service at the judgment debtor's company address, the judgment creditor should have served the bankruptcy notice at the judgment debtor's home address. At the hearing of the appeal, counsel for the judgment creditor replied that (a) three attempts were made at personal service at the address provided in the letter of guarantee which was signed by the judgment debtor and therefore the requirements of Practice Direction 1 of 1968 had been complied with; (b) the address at which service was attempted on was exactly the address provided by the judgment debtor in the letter of guarantee; (c) the judgment debtor cannot be heard to say that he did not have notice of the bankruptcy notice since he had come to court knowing that the notice had been served; and (d) the judgment debtor had all along been aware that the judgment creditor was attempting to serve the notice on him at the given business address.

Held, dismissing the appeal with costs:

(1) The judgment creditor had complied with all the necessary steps required for

it to make an application for substituted service of the bankruptcy notice, having made three attempts at personal service at the address stated in the letter of guarantee (see para 1).

(2) The judgment creditor was entitled to rely on the address as stated in the letter of guarantee as the address by which the notice can be effectively served (see para 5).

(3) It is not open to the judgment debtor to say that the address had been wrongly inserted later by the judgment creditor's solicitors. It was his duty to make any such correction of any wrong address that had been so stated (see para 5).

[Bahasa Malaysia summary

Penghutang Penghakiman merayu terhadap keputusan Penolong Kanan Pendaftar kerana menolak permohonan penghutang penghakiman untuk mengenepikan perintah penyampaian ganti notis kebankrapan yang telah diserahkan melalui pengiklanan, penampalan di papan notis mahkamah dan penampalan di alamat terakhir di alamat syarikat yang telah disediakan oleh penghutang penghakiman dalam surat jaminan. Alasan-alasan untuk rayuan adalah antara lain bahawa (1) pemiutang penghakiman seharusnya membuat dua panggilan di alamat kediaman penghutang penghakiman sebagaimana diperlukan dan Nota Amalan No. 1 1968; (2) penyampaian kediri notis kebankrapan yang dimaksudkan ke atas penghutang penghakiman dibuat di alamat syarikat yang salah; dan (3) setelah gagal untuk menyerahkan notis secara penyampaian kediri di alamat syarikat penghutang penghakiman, penghutang penghakiman hendaklah menyerahkan notis kebankrapan di alamat kediaman penghutang penghakiman. Semasa pendengaran rayuan, peguamcara untuk penghutang penghakiman menjawab bahawa (a) 3 cubaan penyampaian kediri telah dibuat di alamat yang telah disediakan dalam surat jaminan yang telah ditandatangani oleh penghutang penghakiman dan oleh itu keperluan-keperluan Arahan Amalan 1 1968 telahpun dipatuhi; (b) alamat dimana penyampaian cuba dibuat adalah alamat yang telah disediakan oleh penghutang penghakiman dalam surat jaminan; (c) penghutang penghakiman tidak boleh kedengaran mengatakan bahawa beliau tidak mempunyai pengetahuan berkenaan notis kebankrapan memandangkan beliau telah datang ke mahkamah mengetahui bahawa notis telahpun disampaikan; dan (d) penghutang penghakiman telah pada setiap ketika mengetahui bahawa penghutang penghakiman telah mencuba untuk menyampaikan notis kepadanya pada alamat perniagaan yang telah diberikan.

Diputuskan, menolak rayuan dengan kos:

(1) Pemiutang penghakiman telah mematuhi kesemua langkah-langkah perlu untuknya membuat permohonan bagi penyampaian ganti notis kebankrapan, setelah membuat 3 cubaan penyampaian kediri pada alamat yang dinyatakan dalam surat jaminan (lihat perenggan 1).

(2) Pemiutang penghakiman adalah berhak untuk bergantung kepada alamat sebagaimana dinyatakan dalam surat jaminan kerana alamat tersebut akan menyebabkan notis menjadi efektif untuk disampaikan (lihat perenggan 5).

(3) Ia tidak terbuka kepada penghutang penghakiman untuk mengatakan bahawa alamat kemudiannya telah secara salah dimasukkan oleh peguamcara pemiutang penghakiman. Ia adalah menjadi tugasnya untuk membuat pembetulan ke atas kesilapan alamat yang mana ia telahpun dinyatakan (lihat perenggan 5).]

Notes

For the case on practice and procedure of bankruptcy, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) para 2871.

For cases on substituted service, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) paras 2622–2630.

For cases on duty of customer on banking law, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1835–1837.

Cases referred to

HSBC Bank Malaysia Bhd v John Bin Jae [2002] MLJU 372 (refd)

Re Aris bin Massod; Ex parte UOL Factoring Sdn Bhd [1998] 3 AMR 3155 (refd)

Adrian Hii (Tan Lee Chin with him) (Shook Lin & Bok) for the judgment creditor.
Suria Kumar (Suria Kumar & Co) for the judgment debtor.

Kang Hwee Gee J:

THIS IS MY ORAL JUDGMENT: (EX-TEMPORE)

[1] This is an appeal from the decision of the Senior Assistant Registrar in dismissing the judgment debtor's application to set aside the order of the substituted service of the bankruptcy notice which was served by advertisement and posting at the court notice board as well as by posting the notice to an address of a company which the judgment debtor had provided in the letter of guarantee.

THE GROUNDS FOR MAKING THIS APPEAL ARE AS FOLLOWS

(1) The judgment creditor should have made two calls at the judgment debtor's residential address as required by Practice Note No 1 of 1968. There are evidence that the judgment creditor had knowledge of the judgment debtor's residential address as they had in their possession copies of Form 49 of the company and further copy of the judgment debtor's identity card.

(2) The purported personal service of the bankruptcy notice on the judgment debtor was made at the company wrong address. The subsequent letter of appointment to serve the bankruptcy notice at that address was returned with the endorsement 'wrong address' by the postal authority.

(3) Having failed to serve the notice by personal service at the judgment debtor's company address, the judgment creditor should have served the bankruptcy notice at the judgment debtor's home address.

Submits: see *Re Aris bin Massod (NRIC No. 042984)* Ex parte UOL Factoring Sdn Bhd [1998] 3 AMR 3155 at p 3163 per Steve Shim J as follows:

In summary therefore, having regard to all the circumstances, I do not think that the JC had complied with the guideline set out in the Practice Note No I of 1968. Such contravention and/or non-compliance would have a debilitating effect upon the stand taken by the JC which in turn militates against granting its application. For the reasons given, I hold that the application for the BN to be served on the JD by way of substituted service should have been refused and therefore the order granted thereunder is invalid and should be set aside. That being the position, it must follow that the order for extension of the BN obtained thereafter is also invalid and ought to be set aside.

(see *HSBC Bank Malaysia Bhd v John Bin Jae* [2002] MLJU 372 per Clement Skinner J that full disclosure must be made of the address of the persons intended to be served by substituted service. Here judgment creditor knew residential address of judgment debtor but failed to state in the affidavit supporting the application for substituted service that judgment debtor had a known residential address).

REPLY BY COUNSEL FOR THE JUDGMENT CREDITOR

(1) We made three attempts at personal service at the address provided in the letter of guarantee signed by the judgment debtor. Refer to affidavit filed by a clerk from our firm Adnan bin Yunus supporting the application for substituted service in court file encl 4 says as follows:

Saya telah diarahkan oleh Tetuan Shook Lin & Bok, peguamcara bagi pihak Pemiutang Penghakiman untuk menguatkuasakan penyampaian ke diri sesalinan bermeterai Notis Kebankrapan dalam tindakan ini yang pada pendapat saya adalah telah mengikut aturan yang dikeluarkan daripada dan di bawah meterai Mahkamah Tinggi, Kuala Lumpur oleh pihak Pemiutang Penghakiman terhadap pihak Penghutang Penghakiman di sini yang mana Notis Kebankrapan dan salinan-salinannya telah ditandatangani dan diindorskan di dalam cara dan bentuk yang ditentukan oleh Kaedah-Kaedah Kebankrapan, 1969 dan sesalinan Notis Kebankrapan tersebut dilampirkan di sini dan bertanda sebagai Ekshibit 'A'.

Saya telah pada hari Rabu 12 Mei 2005 pada jam 3:30 petang dan pada hari Isnin, 17 Mei 2004 pada jam 10:20 pagi hadir bagi tujuan untuk menguatkuasakan penyampaian ke diri Notis Kebankrapan terhadap pihak Penghutang Penghakiman di premisnya yang dikenali sebagai No. 8-2, Jalan Wangsa Setia 4, Wangsa Melawati, 54200 Kuala Lumpur. Pada kedua-dua masa tersebut, saya diberitahu oleh seorang wanita Cina di sana bahawa dia tidak mengenali Penghutang Penghakiman yang berkemungkinan penyewa terdahulu dan sudah pun pindah.

Pada 21 Mei 2004, peguamcara bagi pihak Pemiutang Penghakiman telah mengirimkan sepucuk surat penetapan tarikh temujanji melalui Pos Berdaftar A.R. dan Surat Akuan Mengepos kepada Penghutang Penghakiman untuk memaklumkan tarikh dan masa apabila seorang kerani mereka akan hadir di alamat pihak Penghutang Penghakiman untuk menguatkuasakan penyampaian ke diri Notis Kebankrapan tersebut pada hari Selasa, 8 Jun 2004 pada jam 10:00 pagi dan sesalinan benar Notis Kebankrapan dilampirkan di dalam surat penetapan tersebut. Sesalinan surat-surat penetapan tersebut, bukti penghantaran melalui Surat Akuan Mengepos dan Pos Berdaftar A.R. dilampirkan di sini dan masing-masing bertanda sebagai eks 'B', 'C' dan 'D'.

Pada hari Selasa, 8 Jun 2004 pada jam 10:00 pagi akibat daripada surat penetapan tersebut, saya telah hadir di premis pihak Penghutang Penghakiman iaitu di No. 8-2, Jalan Wangsa Setia 4, Wangsa Melawati, 54200 Kuala Lumpur bagi tujuan menguatkuasakan penyampaian Notis Kebankrapan secara ke diri terhadap pihak

Penghutang Penghakiman dan pada kali ini juga saya diberitahu oleh seorang wanita Cina di sana bahawa beliau tidak mengenali Penghutang Penghakiman yang berkemungkinan penyewa terdahulu dan sudah pun pindah.

Saya telah menggunakan segala usaha-usaha yang berpatutan dan kesemua cara di dalam bidang kuasa saya untuk menguatkuasakan penyampaian ke diri Notis Kebankrapan terhadap pihak Penghutang Penghakiman tetapi tidak dapat berbuat demikian.

Dalam keadaan yang sedemikian, saya sesungguhnya percaya Notis Kebankrapan tersebut tidak dapat disampaikan secara berkesan terhadap pihak Penghutang Penghakiman tanpa sebarang kelewatan oleh kerana pihak Penghutang Penghakiman cuba mengelakkan diri dari penyampaian Notis Kebankrapan tersebut.

Saya sesungguhnya percaya bahawa jika penyampaian Notis Kebankrapan terhadap pihak Penghutang Penghakiman dilakukan secara penyampaian ganti, iaitu dengan menampalkan salinan-salinannya berserta satu salinan bermeterai perintah untuk penyampaian ganti pada Papan Notis Mahkamah Tinggi Kuala Lumpur dan pada satu bahagian yang terang di premis yang dikenali sebagai No. 8-2, Jalan Wangsa Setia 4, Wangsa Melawati, 54200 Kuala Lumpur dan dengan mengiklankan sekali satu notis di dalam akhbar tempatan iaitu 'The Star', ia mungkin berkesan dalam membawa Notis Kebankrapan tersebut kepada pengetahuan pihak Penghutang Penghakiman.

(2) We have therefore complied with the requirements of Practice Direction 1 of 1968 requiring two attempts at personal service to be made either at the residential address, if known; otherwise, or if the claim relates to his business, at his business address.

(3) The address that we attempted to serve on was exactly the address provided by the judgment debtor in the letter of guarantee which he signed. If there is any change of address or if the address is incorrect then it is the duty of the judgment debtor to make any such correction by notifying the judgment creditor.

(4) The judgment debtor cannot be heard to say that he did not have notice of the bankruptcy notice since he had come to court knowing that the notice had been served.

(5) The judgment debtor had also raised the same issue with respect to the service on the company's wrong address at the writ stage when the judgment creditor served the writ at the same address showing thereby that he had all along been aware that the judgment creditor was attempting to serve the notice on him at the given business address.

REPLY BY COUNSEL FOR THE JUDGMENT DEBTOR

[2] The judgment creditor had knowledge of the correct address as they had been sending statements of account of the company to the correct business address.

[3] The judgment debtor had stated in his affidavit that the address was put in later by the bank solicitors.

[4] The judgment creditor cannot rely on the facts pertaining to service of writ upon which the judgment notice was made. There was no evidence of the letter of appointment returned marked 'wrong address'.

FINDINGS AND DECISION

[5] Having heard the submission of parties my findings are as follows:

(1) The judgment creditor had complied with all the necessary steps required for it to make an application for substituted service of the bankruptcy notice having made three attempts at personal service at the address stated in the letter of guarantee.

(2) The judgment creditor was entitled to rely on the address as stated in the letter of guarantee as the address by which the notice can be effectively served.

(3) It is not open to the judgment debtor to say that the address had been wrongly inserted later by the judgment creditor solicitors. It was his duty to make any such correction of any wrong address that had been so stated.

Appeal dismissed with costs.

Reported by Eugene Daniel Louis